Supreme Court, U.S.
FILED
(1)
94 322 AUG 2 2 1994
No.
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAUL STUART, an Individual,
as Guardian *Ad Litem* for Nicholas Stuart;
in His Individual Capacity; and as Administrator of the
Estate of BABETTE STUART, Deceased,

Petitioners,

vs.

THE UNITED STATES GOVERNMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RAYMOND PAUL JOHNSON
Counsel of Record

LAW OFFICES OF RAYMOND PAUL JOHNSON

10990 Wilshire Boulevard, Suite 1150
Los Angeles, California 90024
(310) 246-9300

Attorneys for Petitioners

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

7788

QUESTIONS PRESENTED FOR REVIEW

I. IS THE TESTIMONY OF A QUALIFIED EXPERT ON ACCEPTED POLICE PURSUIT STANDARDS NECESSARY FOR THE TRIER OF FACT TO DETERMINE REASONABLE CONDUCT WHERE U.S. BORDER PATROL AGENTS INITIATE A HIGH-SPEED VEHICULAR PURSUIT IN A RESIDENTIAL AREA?

II. IN AN ACTION APPLYING CALIFORNIA LAW UNDER THE FEDERAL TORT CLAIMS ACT, ARE U.S. BORDER PATROL AGENTS WHO INITIATE A HIGH-SPEED PURSUIT IMMUNE FROM LIABILITY PURSUANT TO CALIFORNIA GOVERNMENT CODE § 820.2?

III. IN AN ACTION APPLYING CALIFORNIA LAW UNDER THE FEDERAL TORT CLAIMS ACT, MAY U.S. BORDER PATROL AGENTS WHO INITIATE A HIGH-SPEED PURSUIT BE HELD LIABLE FOR FAILURE TO BALANCE THE RISK OF HARM TO THE PUBLIC POSED BY INITIATION OF THE PURSUIT AGAINST ANY NEED TO IMMEDIATELY APPREHEND SUSPECTED ILLEGAL ALIENS?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

I. THIS COURT SHOULD ESTABLISH THAT THE TESTIMONY OF QUALIFIED POLICE PURSUIT EXPERTS IS NECESSARY FOR THE TRIER OF FACT TO DETERMINE REASONABLE CONDUCT WHERE U.S. BORDER PATROL AGENTS INITIATE HIGH-SPEED VEHICULAR PURSUITS 11

Page

II. THIS COURT SHOULD ESTABLISH THAT THE INITIATION OF A HIGH-SPEED VEHICULAR PURSUIT BY U.S. BORDER PATROL AGENTS IS NOT IMMUNE FROM LIABILITY UNDER STATE LAW AS A DISCRETIONARY FUNCTION 14

III. THIS COURT SHOULD ESTABLISH THAT U.S. BORDER PATROL AGENTS WHO INITIATE A HIGH-SPEED VEHICULAR PURSUIT MAY BE HELD LIABLE FOR NEGLIGENT FAILURE TO BALANCE THE RISK OF HARM TO THE PUBLIC POSED BY INITIATION OF THE PURSUIT AGAINST THE NEED TO APPREHEND THE SUSPECTS 19

CONCLUSION 21

LIST OF APPENDICES

Page

APPENDIX A

OPINION, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED MARCH 1, 1994 ..... A-1

APPENDIX B

ORDER DENYING PETITION FOR REHEARING AND AMENDING OPINION, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED MAY 24, 1994 ..... B-1

APPENDIX C

DECISION, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 17, 1992, ENTERED AUGUST 19, 1992 ..... C-1

APPENDIX D

JUDGMENT, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 20, 1992, ENTERED AUGUST 21, 1992 ..... D-1

Page

APPENDIX E

MEMORANDUM OF OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 20, 1992 .... E-1

APPENDIX F

DECISION ON MOTION FOR NEW TRIAL, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED DECEMBER 1, 1992, ENTERED DECEMBER 2, 1992 ..... F-1

APPENDIX G

28 U.S.C. § 1346(b) G-1

APPENDIX H

CALIFORNIA GOVERNMENT CODE § 820.2 ..... H-1

APPENDIX I

28 U.S.C. § 2680(a) I-1

Page

APPENDIX J

RULE 702, FEDERAL RULES
OF EVIDENCE J-1

TABLE OF AUTHORITIES

Page

Cases

Berkovitz v. United States,
486 U.S. 531 (1988) 16

Bratt v. City and County of San Francisco,
50 Cal.App.3d 550,
123 Cal.Rptr. 774 (1st Dist. 1975) 15

Brummett v. County of Sacramento,
21 Cal.3d 880,
148 Cal.Rptr. 361 (1978) 19

Cimo v. Immigration and Naturalization Service,
16 F.3d 1039 (9th Cir. 1994) 14, 18, 20

City of Sacramento v. Superior Court,
131 Cal.App.3d 395,
182 Cal.Rptr. 442 (3rd Dist. 1982) 15, 19, 20

Ewell v. United States,
776 F.2d 246 (10th Cir. 1985) 16

Foster v. United States,
923 F.2d 765 (9th Cir. 1991) 16, 17

Garcia v. United States,
826 F.2d 806 (9th Cir. 1987) 17

Page

Gibson v. City of Pasadena,
83 Cal.App.3d 651,
148 Cal.Rptr. 68 (2nd Dist. 1978) 15, 19, 20

Montes v. United States,
778 F. Supp. 19 (S.D. Cal. 1991) 20

Reenders v. City of Ontario,
68 Cal.App.3d 1045,
137 Cal.Rptr. 736 (4th Dist. 1977) 15, 20

Richardson v. United States,
943 F.2d 1107 (9th Cir. 1991) 16

Stark v. City of Los Angeles,
168 Cal.App.3d 276,
214 Cal.Rptr. 216 (1st Dist. 1985) 19, 20

Summers v. United States,
905 F.2d 1212 (9th Cir. 1990) 16, 17

Tomcsik v. United States,
720 F.Supp. 588 (E.D. Mich. 1989),
aff'd, 917 F.2d 564,
cert. denied, 111 S.Ct. 1417 . . . . . 12, 13

United States v. Muniz,
374 U.S. 150 (1963) 16

United States v. Varig Airlines,
467 U.S. 797 (1984) 16

Page

West v. United States,
617 F. Supp. 1015 (C.D. Cal. 1985) 14, 18, 20

Statutes

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2680(a) 4, 15-17

28 U.S.C. § 1346(b) 2, 3, 15

California Government Code § 820.2 . . 3, 14-16, 18, 22

California Vehicle Code § 17004.7 10

Rules

Federal Rules of Evidence, Rule 702 . . . . . 4, 11

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PAUL STUART, AN INDIVIDUAL, AS GUARDIAN *AD LITEM* FOR NICHOLAS STUART; IN HIS INDIVIDUAL CAPACITY; AND AS ADMINISTRATOR OF THE ESTATE OF BABETTE STUART, DECEASED,

Petitioners,

vs.

THE UNITED STATES GOVERNMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit affirming the judgment of the district court dated March 1, 1994, is attached as Appendix A. The Order denying the petition for rehearing and amending the Opinion of the Court of Appeals for the Ninth Circuit, dated May 24, 1994, is attached as Appendix B.

The Decision of the United States District Court for the Central District of California in favor of defendant and against plaintiffs entered August 19, 1992 is attached as Appendix C. The Judgment of the district court entered August 21, 1992 is attached as Appendix D. The district court's Memorandum of Opinion, Findings of Fact and Conclusions of Law dated August 20, 1992 is attached as Appendix E. The Decision on Motion for New Trial by the district court entered December 2, 1992 is attached as Appendix F.

JURISDICTION

Original federal jurisdiction over these proceedings is conferred under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), which provides in pertinent part that "the district

---

[1] The parties to the proceedings before the United States Court of Appeals were those indicated by the case caption.

courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."

The Opinion of the Court of Appeals for the Ninth Circuit affirming the judgment of the district court was filed on March 1, 1994 (Appendix A). A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on March 15, 1994. The Order denying the Petition for Rehearing and amending the original Opinion of the Court of Appeals for the Ninth Circuit was filed on May 24, 1994 (Appendix B).

Jurisdiction of this Court to review the judgment in this case by writ of certiorari is conferred under 28 U.S.C. § 1254(1).

Pursuant to Rule 13 of the Rules of the Supreme Court, this Petition for Writ of Certiorari is timely.

STATUTORY PROVISIONS

This case arises under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (Appendix G), which provides that the substantive law in this particular action be "in accordance with the law of the place where the act or omission occurred," that is, the law of the State of California.

The questions presented for review in this Petition involve the California discretionary immunity statute, California Government Code § 820.2 (Appendix H), which

provides that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him."

Other questions presented herein involve the statutory discretionary immunity exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (Appendix I), which provides that the United States Government is not liable for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government."

Finally, this Petition involves Rule 702 of the Federal Rules of Evidence (Appendix J), which provides that qualified expert witness testimony is admissible where "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

STATEMENT OF THE CASE

This is a negligence action against the United States Border Patrol acting under the auspices of the defendant United States Government. The case arises from the acts of U.S. Border Patrol agents who initiated an extremely dangerous high-speed chase of suspected illegal aliens in a residential area more than 50 miles north of the border between the United States and Mexico. That chase resulted in the violent death of innocent 32-year-old Babette Stuart, the pregnant wife and mother of plaintiffs Paul and Nicholas Stuart, respectively.

Plaintiffs-petitioners contend that the initiation of the vehicular pursuit violated commonly accepted standards for the conduct of safe pursuits by law enforcement officers, as well as the duty of due care imposed by applicable California law. Plaintiffs-petitioners further contend that the risk of harm to the public posed by this particular pursuit far outweighed any need to immediately apprehend suspected illegal aliens.

Shortly after 10:00 p.m. on the evening of February 6, 1990, United States Border Patrol Agents Johnathan D. King and Carlos J. Ramos were proceeding south during roving patrol on Rainbow Canyon Road near the City of Temecula, California, more than 50 miles north of the U.S./Mexican border. The agents were allegedly headed towards the Immigration Check Station on Interstate Highway 15.

At that time, Paul Stuart, his pregnant wife Babette Stuart and their small son Nicholas were returning home from visiting Babette's parents. The Stuarts were traveling eastbound on State Route 79 in their family vehicle. As they approached the intersection of State Route 79 and Pala Road, in the City of Temecula, Paul Stuart was at the driver's wheel; Babette and Nicholas were passengers. All were using seatbelts.

Temecula is a suburban community that has experienced substantial population growth and extensive development of new housing tracts since 1983. Traffic conditions in Temecula at the time of this incident included considerable traffic on and around State Route 79.

Rainbow Canyon Road, the roving patrol area, eventually runs through Temecula and begins as a twisting, turning canyon road, with sharp curves and extremely limited visibility. The U.S. Border Patrol alleges that transporters of illegal aliens have been known to travel Rainbow Canyon Road in order to avoid the Immigration Check Station established approximately 50 miles north of the Mexican border on Interstate Highway 15.

On this particular evening, at about 10:15 p.m., Agents Ramos and King were conducting a roving patrol on Rainbow Canyon Road when they observed a blue Hyundai automobile approaching from the opposite direction. The agents pulled off into the bushes at the side of the road, parked facing the road, and turned off their vehicle's headlights.

As the Hyundai passed in front of the parked Border Patrol car, the agents flashed their headlights. At that time, the Hyundai was not being driven recklessly or posing any threat to other traffic, and was proceeding at only about 25 miles per hour.

Agents Ramos and King report that most of the illegal aliens traveling through the Temecula area are Hispanic and according to the agents, as the Hyundai passed through their headlights, the occupants inside appeared to be Hispanic. For that reason, the Border Patrol agents immediately turned on their red overhead emergency lights and pulled out of the bushes behind the passing Hyundai.

The driver of the Hyundai did not immediately stop. Instead, he continued to proceed slowly north on Rainbow Canyon Road for about a quarter of a mile. At that point, the Border Patrol agents flipped on their vehicle's siren. The driver of the Hyundai immediately accelerated, and began speeding along Rainbow Canyon Road toward Pala Road, driving recklessly and dangerously.

The intersection of Pala Road and State Route 79 is a busy, hazardous, blind T-intersection with sharp, right-angled turns and missing traffic advisory signs. Traffic visibility at that intersection is blocked by a solid continuous six-foot-high cement wall, as well as other obstructions. Border Patrol agents Ramos and King admittedly knew that, because of those obstructions, unsuspecting drivers of vehicles proceeding eastbound into the intersection on State Route 79 could neither see nor hear other vehicles traveling northbound on Pala Road from Rainbow Canyon Road, the direction of the high-speed pursuit.

At about 10:20 p.m., the fleeing Hyundai sped along Pala Road and headed into the intersection of State Route 79; agents Ramos and King were chasing closely behind. Both vehicles sped into the intersection out of control, and were unable to stop. Tragically, at that exact moment, Paul Stuart was driving the family car with his son Nicholas and wife Babette eastbound on Route 79 into the same intersection.

Paul Stuart never saw the approaching Hyundai nor the pursuing Border Patrol vehicle closely behind. Because of the obstructions at the blind intersection, he was unable

to see the headlights of either vehicle, and as the Border Patrol agents admittedly knew, he could neither see nor hear the emergency lights or siren of the Border Patrol car.

Instead, Paul Stuart received no warning and glimpsed only a brief flash of light, followed by the loud sickening sound of a crash, as the pursued Hyundai lost control through the stop sign at Pala Road and Route 79 and collided with the Stuart vehicle.

The car containing Paul, Babette and Nicholas Stuart was struck broadside, smashed, spun out of control, and hurled across Route 79 to the far north side of the highway. Paul Stuart and his baby son, Nicholas, were injured, and his pregnant wife, Babette Stuart, was killed.

Plaintiffs-petitioners initiated this action against the defendant United States Government pursuant to the Federal Tort Claims Act in the United States District Court for the Central District of California. A court trial without jury was held before United States District Judge Lawrence T. Lydick, sitting as the sole trier of fact.

As the United States Court of Appeals for the Ninth Circuit later observed upon review, "the conduct of the trial court was not a model of judicial decorum and impartiality" (Appendix A). When plaintiffs' counsel attempted to ask plaintiffs' police pursuit expert to give his opinion and analysis regarding whether the Border Patrol agents' decision to attempt to stop the suspects was negligent, under the circumstances of this case, Judge Lydick repeatedly interrupted, threatened counsel with contempt, and improperly excluded the expert's testimony.

Plaintiffs' expert, Dr. Geoffrey Alpert, was trying to testify about the standards commonly accepted and employed by police officers in determining when the need to immediately apprehend a suspect outweighs the risk to public safety inherent in a high-speed vehicular pursuit, and the applicability of those standards to the initiation of the traffic stop in this particular case.

Prior to trial, the Expert Witness Narratives filed by plaintiffs with the district court made it clear that Dr. Alpert's testimony would deal with reasonable police pursuit practices. Plaintiffs' Trial Brief also emphasized that Dr. Alpert would testify at trial regarding reasonable standards for conducting safe police pursuits, and the specific necessity of balancing the risk to public safety against the need to apprehend suspects in this particular case.

At trial, Dr. Alpert was expressly and specifically qualified before the district court as an expert in police vehicle pursuit procedures. During qualification, Dr. Alpert testified about the existence of commonly accepted police standards regarding high-speed vehicular pursuits. In fact, the entire substance of Dr. Alpert's qualification testimony dealt exclusively with accepted police standards for the safe conduct of pursuits.

Nevertheless, following Dr. Alpert's general qualification testimony, Judge Lydick prevented him from rendering and explaining his expert opinion regarding the initiation of the pursuit. That testimony would have dealt specifically with whether and how the Border Patrol agents in this specific case violated accepted police pursuit

standards by attempting a traffic stop and initiating a high-speed pursuit *under the particular facts and circumstances of this case*; that is, for example, where the persons sought are suspected merely of illegal immigration and the chase would proceed through busy residential areas.

After trial, Judge Lydick rendered a Decision and Judgment in favor of the defendant Government (Appendices C and D). In his Memorandum of Findings of Fact and Conclusions of Law, Judge Lydick held that the Government was not liable in this action because the Border Patrol agents were not negligent, and in the alternative, because their actions were immune from liability under California Vehicle Code § 17004.7 (Appendix E). Plaintiffs' Motion For New Trial was denied by Judge Lydick on December 2, 1992 (Appendix F).

On January 25, 1993, plaintiffs filed and served their Notice of Appeal. Plaintiffs' appeal was brought, in pertinent part, on the grounds that Judge Lydick's exclusion of proffered testimony by plaintiffs' police pursuit expert was a prejudicial abuse of discretion. On March 1, 1994, the United States Court of Appeals for the Ninth Circuit filed its decision and entered its judgment affirming the decision of the district court (Appendix A).

On March 15, 1994, plaintiffs timely filed their Petition for Rehearing and Suggestion for Rehearing *En Banc*. On May 24, 1994, the United States Court of Appeals for the Ninth Circuit denied plaintiffs' Petition for Rehearing, rejected the Suggestion for Rehearing *En Banc*, and amended the Court's original Opinion (Appendix B). The Ninth Circuit's Opinion, as amended, reversed the

district court's finding of immunity under California Vehicle Code § 17004.7, but otherwise affirmed the district court's alternative holding and the entry of judgment for the defendant United States Government.

The Opinion of the Ninth Circuit in this case, as amended, has been approved for publication by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ESTABLISH THAT THE TESTIMONY OF QUALIFIED POLICE PURSUIT EXPERTS IS NECESSARY FOR THE TRIER OF FACT TO DETERMINE REASONABLE CONDUCT WHERE U.S. BORDER PATROL AGENTS INITIATE HIGH-SPEED VEHICULAR PURSUITS

The testimony of plaintiffs' police pursuit procedures expert was clearly admissible under Federal Rule of Evidence 702 (Appendix J). Rule 702 specifically provides that an expert may testify where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Here, the testimony that the district court summarily excluded was *essential* to even a basic understanding of the ultimate issue of negligence in this action.

Nevertheless, in its review of this case, the Court of Appeals for the Ninth Circuit held that the exclusion of plaintiffs' expert police procedures testimony was not an abuse of discretion. The Ninth Circuit has now established

a dangerously defective precedent by publishing its opinion that "'standard police procedure,' as developed by an expert, may not shed light on what is reasonable conduct for border patrol officers" (Appendix A).

Whether the risk to public safety posed by a particular police pursuit is justified by the need to apprehend a specific suspect is clearly outside the ordinary experience of lay persons. When that issue is raised, the testimony of qualified and experienced police procedure experts is not only reasonable, but necessary to assist the trier of fact in understanding whether the pursuit was negligently initiated. *See Tomcsik v. United States,* 720 F.Supp. 588, 593-96 (E.D. Mich. 1989), *aff'd,* 917 F.2d 564, *cert. denied,* 111 S.Ct. 1417.

In *Tomcsik,* the plaintiff offered testimony of a consultant in police procedures, who indicated that the high-speed pursuit by federal law enforcement officers was unnecessary and reckless under the circumstances of that case. *Tomcsik,* 720 F.Supp. at 593. Plaintiffs' expert testified at length that the pursuing officer did not act as a reasonably prudent officer should, and that the particular circumstances presented a high risk to the public that made the undertaking of a pursuit negligent. *Tomcsik, id.*

The defendant U.S. Government then called its own expert witness, a police veteran with a doctorate in Criminal Justice. *Tomcsik,* 720 F.Supp. at 593-94. The Government expert testified that the pursuing officers had acted as reasonably prudent officers should, and that they performed appropriately in initiating the pursuit because the suspect was a highly dangerous and violent criminal. *Tomcsik, id.*

The *Tomcsik* court carefully considered all testimony from both parties' police pursuit experts before reaching its conclusion that the federal law enforcement agents had not been negligent in that particular case. *See Tomcsik,* 720 F.Supp. at 594–96. The court discussed the need to balance the risk of injury to citizens inherent in a pursuit against the need to protect citizens from crime, and concluded that the initiation of the pursuit was reasonable under the circumstances because the Government had shown that the pursued suspect was a notorious, violent, fugitive felon, whose continued freedom presented a very substantial danger to the public. *Tomcsik,* 720 F.Supp. at 594.

In the present case, the exclusion of testimony by plaintiff's police pursuit expert, Dr. Geoffrey Alpert, proffered to show that the initiation of the pursuit along Rainbow Canyon and Pala Road was *not* justified because the suspects did *not* present any public danger, was a prejudicial abuse of discretion. The excluded testimony was critically necessary to an understanding of the issue of negligence.

In light of the published opinion of the Ninth Circuit that such expert testimony "may not shed light on what is reasonable conduct," this issue presents an important question of federal law. This Court should settle that question by (1) affirming the decisional practice established in *Tomcsik* that permits and relies on relevant testimony by police pursuit experts for both parties, and (2) reversing the judgment of the Ninth Circuit in this case.

II. THIS COURT SHOULD ESTABLISH THAT THE INITIATION OF A HIGH-SPEED VEHICULAR PURSUIT BY U.S. BORDER PATROL AGENTS IS NOT IMMUNE FROM LIABILITY UNDER STATE LAW AS A DISCRETIONARY FUNCTION

In the present case, the defendant U.S. Government raised California governmental discretionary immunity as an affirmative defense, and argued that discretionary immunity was applicable to the Border Patrol agents' decision to initiate the pursuit in this case. However, the district court did *not* render any specific finding as to whether the agents' decision to initiate the pursuit was immune from liability under California Government Code § 820.2 (Appendix H).

In reviewing the district court's judgment, the Ninth Circuit also failed to overtly discuss this issue. Nevertheless, the Ninth Circuit's Opinion, holding that the exclusion of plaintiffs' expert police procedures testimony was not an abuse of discretion, plainly infers that the proffered testimony was *not relevant* to determining the issue of negligence because Border Patrol officers may not be held liable for initiating vehicular pursuits (Appendix B). The Court of Appeals for the Ninth Circuit has thus left unsettled an important question of law that already has caused previous confusion in district trial courts within the Ninth Circuit. *See, e.g., Cimo v. Immigration and Naturalization Services,* 26 F.3d 1039, 1041 (9th Cir. 1994); and *West v. United States,* 617 F. Supp. 1015, 1017-18 (C.D. Cal. 1985).

In an action against the United States Government under the Federal Tort Claims Act for personal injury or wrongful death resulting from an act or omission of a United States Government employee within the scope of his employment, the substantive law which the Court must apply is the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b) (Appendix G).

However, California case law holding that a public entity is *not* liable for the decision of its police officer to *initiate* a vehicular pursuit, as an exercise of a discretionary function, is based *in all instances* upon the applicability of California Government Code § 820.2 (Appendix G). *See, e.g., Bratt v. City and County of San Francisco,* 50 Cal.App.3d 550, 553, 123 Cal.Rptr. 774, 776 (1st Dist. 1975); *Reenders v. City of Ontario,* 68 Cal.App.3d 1045, 1049, 137 Cal.Rptr. 736, 739-40 (4th Dist. 1977); *Gibson v. City of Pasadena,* 83 Cal.App.3d 651, 659, 148 Cal.Rptr. 68, 72-73 (2nd Dist. 1978); and *City of Sacramento v. Superior Court,* 131 Cal.App.3d 395, 404, 182 Cal.Rptr. 442-49 (3rd Dist. 1982).

The Federal Tort Claims Act sets forth its own analogous statutory discretionary immunity exception, 28 U.S.C. § 2680(a), which provides that the United States Government is not liable for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government" (Appendix H).

28 U.S.C. § 2680(a) is controlling in this case. The immunity from liability for discretionary acts by public

employees provided by California Government Code § 820.2 is inapplicable here. The United States Supreme Court has specifically held that in any action under the Federal Tort Claims Act, 28 U.S.C. § 2680(a) applies, and any state statute granting immunity for discretionary acts by government employees does not. "Whether a discretionary function is involved is a matter to be decided under 28 U.S.C. § 2680(a), rather than under state rules relating to political, judicial, quasi-judicial, and ministerial functions." *United States v. Muniz,* 374 U.S. 150, 164 (1963). *See also Ewell v. United States,* 776 F.2d 246, 249 (10th Cir. 1985).

Furthermore, the negligent initiation of a vehicular pursuit by Border Patrol agents is *not* the exercise or performance of a "discretionary function or duty" within the meaning of 28 U.S.C. § 2680(a). The purpose of the discretionary function exception to the Federal Tort Claims Act is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy. *United States v. Varig Airlines,* 467 U.S. 797, 814 (1984).

The immunity from liability provided by the discretionary function exception to the Federal Tort Claims Act applies then *only* to decisions by government employees which are based upon social, economic, or political policy considerations. *Berkovitz v. United States,* 486 U.S. 531, 537 (1988); *Richardson v. United States,* 943 F.2d 1107, 1110–12 (9th Cir. 1991); *Foster v. United States,* 923 F.2d 765, 768–69 (9th Cir. 1991); and *Summers v. United States,* 905 F.2d 1212, 1214 (9th Cir. 1990). The discretionary function exception to the Tort Claims Act is not applicable if the government employee's decision is not the

type intended to be shielded from tort liability, even though his decision may involve some element of discretion. *Foster,* 923 F.2d at 768. *See also Summers,* 905 F.2d at 1215–16.

In particular, the Ninth Circuit has previously held that "(w)hile law enforcement involves exercise of a certain amount of discretion on the part of individual officers, such decisions do not involve the sort of generalized social, economic and political policy choices that Congress intended to exempt from tort liability." *Garcia v. United States,* 826 F.2d 806, 809 (9th Cir. 1987). Therefore, the discretionary function exception to the FTCA does not shield the U.S. Border Patrol agents in this case from liability for their decision to initiate a high-speed pursuit along the treacherous route of Rainbow Canyon and Pala Roads to State Route 79 in the City of Temecula. *See Garcia,* 826 F.2d 807–08.

In *Garcia, supra,* a Border Patrol agent drove his marked Border Patrol vehicle in pursuit of a suspected illegal alien, "a teenage boy of Mexican appearance acting suspiciously," and attempted to forcibly detain him. The teenager broke away on several occasions before he was finally captured. *Garcia, id.* On appeal, the defendant United States claimed that the Border Patrol agent's actions were all discretionary, within the meaning of the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a). *Garcia,* 826 F.2d at 809. The Court of Appeals emphatically rejected the Government's argument, holding that decisions on the part of individual law enforcement officers are not immune from liability as discretionary functions. *Garcia, id.*

However, in a more recent case arising under circumstances of a Border Patrol pursuit even more similiar to that in the present action, the Ninth Circuit explicitly and deliberately left unsettled the question of whether the federal government can be held liable under California law for its Border Patrol agents' decision to initiate a pursuit. *See Cimo v. Immigration and Naturalization Service,* 16 F.3d at 1041. "(T)hat decision is protected by a species of governmental immunity." *Cimo, id.* Other published decisions of district courts in California also infer that the U.S. Border Patrol cannot be held liable, pursuant to California law, for any negligence of its agents in initiating vehicular pursuits. *See, e.g., West v. United States,* 617 F. Supp. at 1017-18.

The question of whether federal law enforcement officers, and in particular agents of the Border Patrol, may be held liable for negligently initiating vehicular pursuits under circumstances where California state or local police officers would be immune has therefore engendered considerable confusion in the California district courts, and the Court of Appeals for the Ninth Circuit has deliberately failed to provide clear guidance. Accordingly, the question of whether U.S. Border Patrol officers initiating a high-speed vehicular pursuit are immune from liability pursuant to California Government Code § 820.2 is an important question of federal law to be settled by this Court.

III. THIS COURT SHOULD ESTABLISH THAT U.S. BORDER PATROL AGENTS WHO INITIATE A HIGH-SPEED VEHICULAR PURSUIT MAY BE HELD LIABLE FOR NEGLIGENT FAILURE TO BALANCE THE RISK OF HARM TO THE PUBLIC POSED BY INITIATION OF THE PURSUIT AGAINST THE NEED TO APPREHEND THE SUSPECTS

Under the substantive California law applicable in this action, the driver of an authorized emergency vehicle, including a law enforcement officer driving an official vehicle during a pursuit, must act as a reasonably prudent person under the circumstances. *Stark v. City of Los Angeles,* 168 Cal.App.3d 276, 283, 214 Cal.Rptr. 216, 220 (1st Dist. 1985); *Gibson,* 83 Cal.App.3d at 657, 182 Cal.Rptr. at 71-2. A law enforcement officer engaged in a vehicular pursuit has the duty to drive with due regard for the safety of all persons using the highway, and he must drive in such a manner as would not impose upon others an unreasonable risk of harm. *Brummett v. County of Sacramento,* 21 Cal.3d 880, 886, 148 Cal.Rptr. 361, 364-65 (1978); *City of Sacramento,* 131 Cal.App.3d at 402, 182 Cal.Rptr. at 448; and *Gibson,* 83 Cal.App.3d at 657, 148 Cal.Rptr. at 71-2.

Under California law, a finding that law enforcement officers who engaged in a pursuit were negligent may be based on evidence that the initiation of the pursuit created a dangerous situation and an unreasonable risk of harm to others, where no such danger and risk had previously existed. *See Gibson,* 83 Cal.App.3d at 658, 148 Cal.Rptr. at 72. A trier of fact must consider the risk of harm to the

public posed by a fleeing motorist as a factor in determining whether a police officer engaged in a vehicular pursuit was negligent. *See Reenders,* 68 Cal.App.3d at 1053-54, 137 Cal.Rptr. at 742.

Therefore, federal law enforcement officers may be held liable for negligence and the creation of an unreasonably dangerous situation, where the evidence shows that a suspect was not driving dangerously prior to pursuit, and that he began to drive dangerously only because the officers pursued him. *See Gibson, id. See also City of Sacramento,* 131 Cal.App.3d at 406, 182 Cal.Rptr. at 450: "Although [the pursued driver] was vague and inconsistent at times in his deposition, he did indicate that he decided to run the final red light because he saw the officers pursuing him." *See also Stark,* 168 Cal.App.3d at 285, 214 Cal.Rptr. at 222: "Here, the testimony of [plaintiff's expert] provided credible evidence . . . that the officers created the danger, the driver fleeing at high speed because he was being pursued." *See also, by way of comparison only, Reenders,* 68 Cal.App.3d at 1053, 137 Cal.Rptr. at 742.

The fact that high speed pursuits of suspected illegal aliens by the Border Patrol are likely to result in injury and death to innocent third parties is a matter of judicial record in the Ninth Circuit. *See West v. United States,* 617 F. Supp. 1015 (C.D. Cal. 1985); and *Montes v. United States,* 778 F. Supp. 19 (S.D. Cal. 1991). *See also Cimo,* 16 F. 3d at 1041-42.

Indeed, by now the whole of the federal bench must be aware that on repeated occasions innocent third parties have died or suffered severe injury as a result of high-speed

vehicular pursuits by the Border Patrol on or near Interstate Highway 15 in the Temecula area of California. The current political pressures associated with Mexican immigration issues, and two contemporaneously published opinions by the Court of Appeals for the Ninth Circuit (*Stuart* and *Cimo*) that seem to suggest that almost any pursuit conducted by the Border Patrol is reasonable and non-negligent surely pose a grave and lasting threat of increased danger and carnage on California roadways.

Therefore, the question of whether the applicable state standard of due care under the Federal Tort Claims Act requires Border Patrol agents who initiate a high-speed pursuit to balance the risk of harm to the public from the pursuit against any need to immediately apprehend suspected illegal aliens is surely a question of federal law important enough to warrant determination by this Court.

CONCLUSION

The published Opinion of the Court of Appeals for the Ninth Circuit in this case creates a defective and misleading precedent by establishing that expert testimony regarding commonly accepted police pursuit standards is not necessary to a determination by the trier of fact as to what is or is not reasonable conduct where Border Patrol agents initiate high-speed vehicular pursuits in residential areas.

In addition, the refusal of the Court of Appeals for the Ninth Circuit to provide clear guidance as to whether Border Patrol agents who initiate a high-speed vehicular pursuit are immune from liability pursuant to state laws

such as California Government Code § 820.2 has resulted in obvious confusion in the Ninth Circuit and elsewhere.

Finally, the failure of the Ninth Circuit to provide reasonable guidance regarding the standard of due care applicable to Border Patrol agents who initiate high-speed vehicular pursuits is likely to lead not only to confusion and conflict in the California district courts, but to a very real increased risk of harm, injury and death to innocent citizens on California's streets and highways.

The petitioners herein respectfully suggest that because of the importance of this case, and because of the critical nature of the public policy interests inherent in the large number of like cases arising from similar vehicular pursuits by the United States Border Patrol, the issues presented in this petition are questions of federal law which have not been, but certainly should be, settled by this Court.

Wherefore, for all of the foregoing arguments and reasons, petitioners respectfully submit that their Petition for Writ of Certiorari should be granted.

August 17, 1994 Respectfully submitted,

LAW OFFICES OF
RAYMOND PAUL JOHNSON

RAYMOND PAUL JOHNSON
Attorneys for Petitioners

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL STUART, an individual, as Guardian Ad Litem for NICHOLAS STUART, in his individual capacity, and as Administrator of the Estate of Babette Stuart, deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 93-55229
D.C. No. CV-91-00042-LTL
OPINION

Appeal from the United States District Court
for the Central District of California
Lawrence T. Lydick, District Judge, Presiding

Argued and Submitted
January 5, 1994—Pasadena, California

Filed March 1, 1994

Before: Alfred T. Goodwin, Cynthia Holcomb Hall, Circuit Judges, and Jack E. Tanner,* District Judge.

Opinion by Judge Goodwin

*Honorable Jack E. Tanner, United States District Judge for the Western District of Washington, sitting by designation.

OPINION

GOODWIN, Circuit Judge:

Paul Stuart appeals from a judgment for the United States in his action for damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671 *et seq.*

Plaintiff and his minor son, Nicholas Stuart, were injured, and his wife died, in an automobile collision in Temecula, California, when a Hyundai fleeing from U.S. Border Patrol agents crashed into the Stuart's automobile. After a bench

trial, the court found that the border patrol agents had not been negligent in pursuing a suspected illegal alien smuggler. As an alternative ground for granting judgment for the United States, the court applied California Vehicle Code § 17004.7(b), which immunizes municipal governments from liability in police chase cases. Stuart appeals from the judgment, assigning error to both rulings, as well as to other occurrences during the trial. While we reverse the district court's alternative holding, we find this error harmless, and affirm the judgment.

The Accident

Shortly after 10 p.m. on the evening of the collision, U.S. Border Patrol agents Carlos Ramos and Johnathan King decided to follow a Hyundai traveling north on Rainbow Canyon Road, believing the occupants to be illegal aliens from Mexico. The agents followed the Hyundai approximately a quarter mile at a speed of about 15 to 20 miles per hour. When the agents turned on the border patrol car siren, the Hyundai sped off with the agents in pursuit. The pursuit was conducted on surface streets at speeds ranging from 25 to 65 miles per hour. When the Hyundai reached the intersection of Pala Road and Highway 79, the driver of the car failed to observe a stop sign and struck the Stuart car, which had been traveling east on Highway 79.

Jurisdiction

The Government argues that this court does not have jurisdiction over all aspects of this appeal because the plaintiffs filed an untimely amended notice of appeal and did not specify all of the grounds for appeal in its timely notice.

The district court entered a final judgment in this case on August 21, 1992. Plaintiffs filed a motion for new trial on August 31, 1992. The district court denied the motion, entering the order on December 2, 1992. A timely filed notice of

appeal was followed by a late, amended notice of appeal. The Government argues that we cannot address the grounds for appeal raised in the amended notice of appeal, including the plaintiffs' claim of judicial bias and misconduct, because it was not timely filed.

This court has the inherent power to permit a party to amend a notice of appeal even without a formal motion. *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989). Further, "a mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake." *Pope v. Savings Bank of Puget Sound*, 850 F.2d 1345, 1347 (9th Cir. 1988) (internal quotation marks omitted). We find both of the *Pope* elements met here. Although the amended notice was late, the original notice was timely, and preserved the appeal. We have jurisdiction.

Trial Court Demeanor

Stuart contends that he was denied a fair trial because the trial judge was biased in favor of the Government. He cites a number of instances in the record where the conduct of the trial judge was not a model of judicial decorum and impartiality. The plaintiff asserts that the judge took over the examination of witnesses in an excessive and abusive manner, denigrating the efforts of counsel to put on the plaintiff's case, and excluded proffered testimony, in a rude and domineering manner.

Lack of Contemporaneous Objections

The Government first contends that Stuart waived any claim of judicial bias or misconduct by failing to raise it at trial. The Government notes that under Federal Rule of Evidence 614(b), the district court had the right to interrogate witnesses, and that any objection to such interrogation must

be made at the time of the questioning. Fed. R. Evid. 614(c). The Government is right; however, judicial discretion in these matters can be abused, and at some level, can defeat the fairness of a trial.

[1] Assuming that contemporaneous objections are not required "where a trial judge's comments were so prejudicial as to deny a party an opportunity for a fair and impartial trial," *Coats & Clark, Inc. v. Gay*, 755 F.2d 1506, 1511 (11th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985), we do not find that the conduct of the judge here was so prejudicial as to deny Stuart a fair trial.

To demonstrate that the trial judge was biased, the aggrieved party must show that the judge's conduct reflected a disposition, based on extrajudicial sources, to treat that party unfairly. *Hansen v. Commissioner of IRS*, 820 F.2d 1464, 1467 (9th Cir. 1987); *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1965). In addition, "a clear and precise showing of prejudice must be made to demonstrate judicial misconduct, particularly in noncriminal trials." *Hansen*, 820 F.2d at 1467.

[2] The trial in this case would not serve as an example for the training of new judges, but it was not a travesty. Many of the rulings now objected to were legally correct. For example, the excluded evidence should have been excluded. Appellant makes much of the tone and style of the adverse rulings, which did leave something to be desired in terms of civility and courtesy to counsel; but he fails to show that the rulings were legally in error.

Reference to Galileo's Revenge

Apparently attempting to fit his appeal into the policy against judicial decisions being founded on extrajudicial sources, Stuart contends that the judge had been influenced by an extrajudicial source: *Galileo's Revenge: Junk Science in*

the Courtroom (1991). The book, written by Peter W. Huber, condemns the plaintiffs' personal injury bar for their use of expert witnesses, who he characterizes as "junk scientists." Huber argues that such experts often have dubious credentials and offer farfetched theories of liability. In court, the judge mentioned the book and spoke disparagingly of "junk science."

The judge believed, from a long career at the bar and on the bench, that the testimony being offered by one or more of the plaintiff's opinion witnesses provided little help to a trier of fact. The judge could determine without the help of an accident reconstruction expert or a highway and traffic safety engineer whether police officers had probable cause to believe that a crime was being committed in their presence. The judge could also determine from the objective evidence and eyewitness testimony whether the officers acted reasonably in pursuing the suspect under all the circumstances of the case.

[3] While the judge "made no secret of his skepticism of appellants' position" it does not necessarily follow that the judge's ultimate fact findings were erroneous. *See Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1383 (9th Cir. 1984). Intemperate bench behavior does not require reversal merely to chastise a judge if the judgment appealed from was one supported by the law and the facts. Here, despite the discomfort level of counsel during the trial, the judgment was based on findings of fact that found support in evidence. The parties were "permitted to respond to the district court's expressed concerns to the best of their ability." *See id.*

Although the appeal concentrates on the judge's participation in the plaintiff's case, the record reveals that the Government also labored uphill at times against sarcasm and interruption. At several points, the judge criticized the Government's attorneys for making too many objections. He also interrupted defense witnesses to ask clarifying questions; to announce his opinion on the evidence; and on one occasion,

to comment negatively on the testifying witness ("this witness doesn't have sense enough to know where his qualifications stop"). The judge even paused to upbraid a defense witness for staring at him from the witness box. ("Is there something bothering you? . . . Then stop staring.").

[4] Most of the cases reversed for trial court conduct have involved jury trials. In these cases, the appellate court found that the trial judge had so interfered with the functioning of the adversarial process as to render the resulting judgment unfair. *See Maheu v. Hughes Tool Co.*, 569 F.2d 459, 471-72 (9th Cir. 1977); *Sit-Set, A.G. v. Universal Jet Exchange, Inc.*, 747 F.2d 921, 926 (4th Cir. 1984); *Pollard v. Fennell*, 400 F.2d 421, 424 (4th Cir. 1968). *But see Anderson v. Sheppard*, 856 F.2d 741 (6th Cir. 1988) (reversing and remanding for judicial bias in non-jury trial). In a non-jury trial, unwanted comments from the judge may be harassing and distracting to counsel, but rarely will they alone result in a miscarriage of justice. The discomfort of the litigants in the instant case is understandable, but the facts of the case did not establish negligence as a matter of law, and the trial court had a factual basis for finding no negligence on the part of the federal agents.

Plaintiff's Expert

Stuart argues that the judge improperly excluded expert testimony from Professor Geoffrey Alpert, who frequently testifies in police pursuit and deadly force cases. Plaintiff says his expert was essential to an understanding of the ultimate issue of negligence. Plaintiff tendered his expert to testify about whether the Border Patrol agents' decision to stop persons suspected only of illegal immigration violated standard police procedures under the circumstances. The judge ordered the testimony excluded and threatened plaintiff's counsel with contempt if he tried to elicit such testimony. The judge's method of expression could have been more graceful, but he was right on the law. We review the exclusion of that type of

tendered opinion evidence under the abuse of discretion standard. *Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 529 (9th Cir. 1986); *Roberts v. College of the Desert*, 870 F.2d 1411, 1418 (9th Cir. 1988).

The questions that elicited the objections appeared to seek an opinion on whether probable cause existed to stop the Hyundai—a question that Mr. Alpert was not as well-qualified as the trier of fact to answer. Moreover, "standard police procedure," as developed by an expert, may not shed light on what is reasonable conduct for border patrol officers. There was no abuse of discretion.

California Vehicle Code § 17004.7

[5] Plaintiff contends that the district court erred in concluding that the United States was immune from suit under California Vehicle Code § 17004.7, which grants immunity to governmental entities whose law enforcement officers engage in vehicle pursuits. We agree. However, the error was harmless.

Whether the United States is immune from liability in an Federal Tort Claims Act action is a question of federal law that we review de novo. *See Gallea v. United States*, 779 F.2d 1403, 1404-05 (9th Cir. 1986).

[6] Under the FTCA, the United States may be liable in tort if a private individual would have been liable under the laws of the state where the act or omission occurred. 28 U.S.C. § 1346(b); *Wright v. United States*, 719 F.2d 1032, 1034 (9th Cir. 1983); *Indian Towing Co. v. United States*, 350 U.S. 61, 63-65 (1955). However, a finding of immunity for state employees under state law does not necessarily mean that the United States has no liability for injuries caused by its employees. *Wright*, 719 F.2d at 1034-35; *Louie v. United States*, 776 F.2d 819, 825 (9th Cir. 1985).

California law limits the government's liability for negligence of law enforcement officers involved in pursuits. The relevant statute reads:

> A public agency employing peace officers which adopts a written policy on vehicular pursuits complying with subdivision (c) is immune from liability for civil damages for personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued by a peace officer employed by the public entity in a motor vehicle.

Cal. Veh. Code § 17004.7(b) (West Supp. 1992).

The trial court ruled that *Aguilar v. United States*, 920 F.2d 1475 (9th Cir. 1990), affords the United States immunity from liability in this case. In *Aguilar*, a divided court held that "where the federal actor is a police officer without a private analogue, liability is determined by reference to state liability for government employees." 920 F.2d at 1477. In that case, the court held that a Nevada state law that limited the state's potential liability for negligence of its police officers to $50,000 was applicable to the United States in an action under the FTCA. *Id.* at 1478.

The plaintiff points out, and we agree, that *Aguilar* is distinguishable. At issue in *Aguilar* was a state statute that placed a monetary cap on liability for the actions of state employees. In this case, California has a state statute granting municipal *immunity*, not a monetary cap.

[7] The Ninth Circuit has refused to grant immunity to federal officers based on state statutes that confer public entity immunity for the conduct of government employees in an action against the United States under the FTCA. *Wright*, 719

F.2d at 1034-35. *Wright* relied on a string of Supreme Court cases holding that state law immunity from liability does not apply to the United States in an action under the FTCA. *See United States v. Muniz*, 374 U.S. 150 (1963); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). In *Indian Towing*, the Court declared that the FTCA was "not selfdefeating by covertly embedding the casuistries of municipal liability for torts." *Id.* at 65. The Court went on to warn: the Court should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Id.* at 69.

[8] Because of the Supreme Court's clear teaching that the "casuistry of municipal law" should not be incorporated into the Federal Tort Claims Act, we hold that California Vehicle Code § 17004.7 does not apply to the United States in an action under the FTCA.[1]

Conclusion

We review a district court's finding of negligence for clear error. *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991). The trial court's finding that the agents acted reasonably under all the circumstances in this case is not clearly erroneous.

AFFIRMED.

[1]Stuart also argues that the U.S. Border Patrol policy does not meet the requirements of the California immunity statute because it fails to set specific objective guidelines for when a pursuit is justified and when it should be terminated. Because we hold that state-conferred immunity for local governments does not immunize the federal government, we need not reach this issue.

APPENDIX B

ORIGINAL
FILED
MAY 24 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL STUART, an individual, Guardian Ad Litem for Nicholas Stuart in his individual capacity and as Administrator of the estate of Babette Stuart, deceased,	NO. 93-55229
	D.C. NO. CV 91-00042-LTL
Plaintiff,	ORDER
vs.	
THE UNITED STATES GOVERNMENT,	
Defendant.	

Filed: May 24, 1994

Before: GOODWIN, HALL, and TANNER,* Circuit Judges.

The opinion filed March 1, 1994, slip op. 2129, is amended as follows:

1. At slip op. 2131, beginning on the last line, through 2132, the next 10 lines,

DELETE THE FOLLOWING:

> After a bench trial, the court found that the border patrol agents had not been negligent in pursuing a suspected illegal alien smuggler. As an alternative ground for granting judgment for the United States, the court applied California Vehicle Code § 17004.7(b), which immunizes municipal governments from liability in police chase cases. Stuart appeals from the judgment, assigning error to both rulings, as well as to other occurrences during the trial. While we reverse the district court's alternative holding, we find this error harmless, and affirm the judgment.

REPLACE WITH THE FOLLOWING:

> After a bench trial, the court applied California Vehicle Code § 17004.7(b), which immunizes municipal governments from liability in police chase

---

* Honorable Jack E. Tanner, United States District Judge for the Western District of Washington, sitting by designation.

cases. The court found the United States immune from liability for the plaintiff's injuries, and dismissed the action. Stuart v. United States, 797 F. Supp. 800, 804 (C.D. Cal. 1992).

As an alternative ground for granting judgment for the United States, the district court found that the border patrol agents had not been negligent in pursuing a suspected illegal alien smuggler. Id. Stuart appeals from the judgment, assigning error to both rulings, as well as to other occurrences during the trial. We reverse the district court's primary holding on the immunity question. However, we affirm the court's alternative holding, and remand for entry of judgment for the defense.

With these amendments, the panel has voted unanimously to deny the petition for rehearing. Judge Hall has voted to reject the suggestion for rehearing en banc, and Judges Goodwin and Tanner so recommends *[sic]*.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

ORIGINAL
FILED
AUG 17 1992
Clerk, U.S. District Court
Central District of California
Santa Ana Office

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL STUART, an individual, Guardian Ad Litem for Nicholas Stuart in his individual capacity and as Administrator of the estate of Babette Stuart, deceased, Plaintiff, vs. THE UNITED STATES GOVERNMENT, Defendant.	NO. SA CV 91-42-LTL(RWRx) DECISION

This matter came on for trial before the Court on August 11, 1992.

The Court decides in favor of defendant and against plaintiff. Written findings of fact and conclusions of law and judgment in accordance with the above Decision will be filed and entered in due course.

The Clerk of the Court will serve copies of this Decision by United States mail upon counsel of record.

DATED: This 17th day of August, 1992.

/s/
Lawrence T. Lydick
United States District Judge

Raymond P. Johnson
LAW OFFICES OF RAYMOND P. JOHNSON
10990 Wilshire Blvd.
Suite 1150
Los Angeles, CA 90024

Jim Sullivan
Office of the US Attorney, Civil Division
Room 7516 Federal Building
300 North Los Angeles Street
Los Angeles, CA 90012

APPENDIX D

ORIGINAL
FILED
AUG 20 1992
Clerk, U.S. District Court
Central District of California
Santa Ana Office

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL STUART, an individual, Guardian Ad Litem for Nicholas Stuart in his individual capacity and as Administrator of the estate of Babette Stuart, deceased,	NO. SA CV 91-42-LTL(RWRx)
Plaintiff,	JUDGMENT
vs.	
THE UNITED STATES GOVERNMENT,	
Defendant.	

The matter having come on for trial before the Court sitting without a jury, the Honorable Lawrence T. Lydick, United States District Judge, presiding; and the issues having been tried and a Decision and written findings of fact and conclusions of law having been rendered,

IT IS ORDERED AND ADJUDGED:

1. That plaintiff take nothing;

2. That the action be dismissed on the merits; and

3. That defendant recover from plaintiffs its costs of suit incurred.

DATED: This 20th day of August, 1992

/s/
Lawrence T. Lydick
United States District Judge

Raymond P. Johnson
LAW OFFICES OF RAYMOND P. JOHNSON
10990 Wilshire Blvd.
Suite 1150
Los Angeles, CA 90024

Scott H. Park, AUSA
Jim Sullivan, AUSA
Office of the US Attorney, Civil Division
Room 7516 Federal Building
300 North Los Angeles Street
Los Angeles, CA 90012

APPENDIX E

ORIGINAL
FILED
AUG 20 1992
Clerk, U.S. District Court
Central District of California
Santa Ana Office

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL STUART, an individual, Guardian Ad Litem for Nicholas Stuart in his individual capacity and as Administrator of the estate of Babette Stuart, deceased, Plaintiff, vs. THE UNITED STATES GOVERNMENT, Defendant.	NO. SA CV 91-42-LTL(RWRx) MEMORANDUM OF OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

This action was brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq. Plaintiff Paul Stuart ("plaintiff") seeks damages from the United

States Government ("defendant") for the death of Babette Stuart and injury to plaintiff and his minor son Nicholas Stuart. Plaintiff is Babette Stuart's surviving husband and brought this suit as an individual, as Guardian Ad Litem for his minor son Nicholas Stuart and as Administrator of the Estate of Babette Stuart.

Babette Stuart died and plaintiff and Nicholas Stuart were injured on February 6, 1990 in an automobile collision in Temecula, California.[1] A two-day trial was held before the Court sitting without a jury on the issues of liability only commencing on August 11, 1992. The Court having issued its written Decision on August 7, 1992, this opinion sets out the Court's findings of fact and conclusions of law as required by Federal Rules of Civil Procedure 52(a).

Findings of Fact and Conclusions of Law

Shortly after 10:00 p.m. on the evening of the collision, United States Border Patrol agents Carlos Ramos ("Ramos") and Johnathan King ("King") were proceeding south on Rainbow Canyon Road to the Interstate 15 Border

---

[1] Plaintiff also has pending a state court wrongful death action arising from the same accident upon which this lawsuit is based entitled Paul Stuart, an Individual, Guardian Ad Litem for Nicholas Stuart, In His Individual Capacity and As An Administrator of the Estate of Babette Stuart, Deceased v. The State of California, The County of Riverside, George Rethati, An Individual; Mountain Valley Homes, an Unincorporated Association; California Sunset Homeowners Association, an Unincorporated Association; Kaufman Broad Homes, a Corporation, Does 1 through 100, Inclusive, Case No. 208980 in the Superior Court of the State of California for the County of Riverside.

Patrol Checkpoint in Temecula, California, during a shift change for the Temecula Border Patrol Station. The two agents were in a Border Patrol car and were observing Rainbow Canyon Road for possible alien smuggling traffic as they drove to the Border Patrol Checkpoint. Agents King and Ramos were acting within the course and scope of their Border Patrol employment, as employees of defendant United States Government, at all times herein.

Rainbow Canyon Road was known by the two agents to be commonly used by alien smugglers to avoid the nearby Temecula Border Patrol Checkpoint on the Interstate 15 freeway which was in operation at that time and was commonly patrolled by Border Patrol agents. At about 10:20 p.m. on the night of the accident, the agents, while proceeding south on Rainbow Canyon Road, observed a car approaching them from the south. The agents pulled off the road and parked facing the road. When the approaching car passed in front of the Border Patrol car, the approaching car and its passengers were illuminated by the headlights of the Border Patrol car.

The agents observed that the approaching car was a Hyundai, that it contained four persons all of whom appeared to be Hispanic and that the persons in the car seemed unnaturally stiff and stared straight ahead as the Hyundai passed through the illumination from the Border Patrol car headlights. It had been the experience of agents King and Ramos that most of the alien smuggling in the Temecula area involved the smuggling of Hispanic aliens and that alien smuggling activity in the Temecula area was usually higher during Temecula Border Patrol Station shift changes.

The agents pulled out onto Rainbow Canyon Road behind the Hyundai, turned on their overhead emergency lights and followed the Hyundai northbound on Rainbow Canyon Road, intending to stop the Hyundai for an immigration inspection of its occupants. The agents followed the Hyundai for approximately 1/4 mile at a speed of approximately 15 to 20 miles per hour. The agents then turned on the Border Patrol car's siren.

When the Border Patrol's siren came on, the Hyundai sped up. Still following the Hyundai, the agents radioed to advise the Temecula Border Patrol Station that the Hyundai had failed to stop. The agents pursued the Hyundai northbound on Rainbow Canyon Road at speeds ranging from 25 to 60 miles per hour. The route traveled by the vehicles on Rainbow Canyon Road contained several curves. The maximum speeds during the pursuit were obtained on the straightaway portions of Rainbow Canyon Road. The agents maintained a distance between their Border Patrol car and the Hyundai of approximately three to five car lengths and observed portions of the Hyundai crossing briefly over the center line of Rainbow Canyon Road during their pursuit. However, the Hyundai never maintained its position on the wrong side of the center line. There were no posted speed limits on the portion of Rainbow Canyon Road involved in the pursuit at the time of the pursuit.

When the Hyundai reached the intersection of Rainbow Canyon Road and Pala Road, it braked and reduced speed slightly but did not observe the "Stop" sign located at that intersection. The Hyundai turned left at the intersection and proceeded northbound on Pala Road,

toward the intersection of Pala Road and Highway 79. The agents radioed to advise the Temecula Border Patrol Station that the Hyundai did not stop at the intersection of Rainbow Canyon Road and Pala Road and pursued the Hyundai onto Pala Road.

Upon reaching the intersection of Pala Road with Highway 79 the Hyundai turned westbound onto Highway 79, failing to observe the "Stop" sign located at that intersection. While turning westbound from Pala Road onto Highway 79, the Hyundai struck the Stuart car, driven by Paul Stuart, that had been traveling eastbound on Highway 79. Both the Hyundai and the Stuart car came to rest on the north side of Highway 79. The Border Patrol car containing agents Ramos and King was approximately seven car lengths behind the Hyundai when the Hyundai collided with the Stuart car. Babette Stuart and Nicholas Stuart were passengers in the Stuart car. Babette Stuart died in the collision, and Paul Stuart and Nicholas Stuart were injured in the collision.

The road was dry on the night of the accident and agents Ramos and King did not observe any vehicles besides the Hyundai and plaintiff's car throughout the pursuit. The entire pursuit lasted less than three minutes and involved a distance of less than three miles. Percipient testimony regarding the majority of the incidents on the night of the accident was limited to that of agents King and Ramos; the occupants of the Hyundai were not called and did not testify at the trial.

At trial, plaintiff attempted to prove, primarily through expert testimony, that after the Hyundai collided

with the Stuart's vehicle the pursuing Border Patrol vehicle also collided with the Stuart's vehicle. This Court finds that plaintiff has not proved by a preponderance of credible evidence his theory that the Border Patrol vehicle occupied by agents Ramos and King struck plaintiff's vehicle at any time.

The United States Border Patrol has adopted a written "Border Patrol Pursuit Policy" governing the operation of Border Patrol vehicles during pursuits and emergency situations. The Court finds that Border Patrol agents Ramos and King and the United States Border Patrol complied with this policy and acted reasonably and exercised due care in their actions involving the pursuit of the Hyundai. The Court therefore finds and concludes that no act or omission by any employee of the United States was a proximate cause of the accident or of any damages or injury to plaintiffs.

As noted above, this is an action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq. As a sovereign, the United States is immune from suit except when it consents to be sued, and "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). The Federal Tort Claims Act is a waiver of the sovereign immunity of the United States government, and courts should not "extend the waiver beyond that which Congress intended." United States v. Kubrick, 444 U.S. 111, 117-118 (1979).

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1346(b) which provides, in part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). Plaintiff complied with the claim requirements of the Federal Tort Claims Act (28 U.S.C. § 2675) and the action was timely filed.

Carlos Ramos and Johnathan King were United States Border Patrol employees, acting within the course and scope of their employment with the defendant at the time of the within accident. Pursuant to 28 U.S.C. § 1346(b), the liability of defendant, if any, is that of an employer under the laws of the State of California where the accident occurred. Thus, unless immune under California law, defendant may be held liable for any negligent acts committed by agents Ramos and King within the scope of their employment with defendant. Cal. Civ. Code § 2338 (West 1985).

Whether the United States is liable under the Federal Tort Claims Act for the actions of federal law enforcement

officers is determined by whether a state public entity would be liable for the actions of its law enforcement officers in like circumstances:

> [W]here the federal actor is a police officer without a private analogue, liability is determined by reference to state liability for government employees. That liability may, for those particular actors, be limited just like liability may be limited, under state law, for federal actors who do have private analogues.

Aguilar v. U.S., 920 F.2d 1475, 1477-78 (9th Cir. 1990).

California law limits the liability of law enforcement officers involved in pursuits:

> A public agency employing peace officers which adopts a written policy on vehicular pursuits complying with subdivision (c) is immune from liability for civil damages for personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued by a peace officer employed by the public entity in a motor vehicle.

Cal. Veh. Code § 17004.7(b) (West Supp. 1992). Pursuant to the Ninth Circuit's decision in Aguilar, section 17004.7(b) may be applied in this action to limit the liability of the defendant for the actions of the federal Border Patrol agents.

California Vehicle Code § 17004.7(c) provides as follows:

> If the public entity has adopted a policy for the safe conduct of vehicular pursuits by peace officers, it shall meet all of the following minimum standards:
>
> (1) It provides that, if available, there be supervisory control of the pursuit.
>
> (2) It provides procedures for designating the primary pursuit vehicle and for determining the total number of vehicles to be permitted to participate at one time in the pursuit.
>
> (3) It provides procedures for coordinating operations with other jurisdictions.
>
> (4) It provides guidelines for determining when the interests of public safety and effective law enforcement justify a vehicular pursuit and when a vehicular pursuit should not be initiated or should be terminated.

Cal. Veh. Code § 17004.7(d) (West Supp. 1992). The determination of whether a policy adopted pursuant to Cal. Veh. Code § 17004.7(c) complies with that subdivision is a question of law for the Court. Cal. Veh. Code § 17004.7(d).

This Court finds that the pursuit policy adopted by the United States Border Patrol satisfies Section 17004.7(c)

of the California Vehicle Code. See also Montes v. U.S., 778 F.Supp. 19, 21 (S.D.Cal. 1991). Specifically, the Border Patrol's pursuit policy provides (1) for supervisory control of the pursuit (Pursuit Policy at § 7(c)); (2) procedures for designating the lead vehicle and determining the maximum number of vehicles permitted to participate in the pursuit (Pursuit Policy at §§ 7(A) and 8(E)); (3) procedures for coordinating operations with other jurisdictions (Pursuit Policy at §§ 5, 7(C)(2)(C), and 8(J)); and (4) guidelines for determining when a pursuit should or should not be initiated and when it should be terminated (Pursuit Policy at §§ 3 and 5). Therefore, pursuant to California Vehicle Code Section 17004.7(b), the United States is immune from liability for plaintiff's injuries.

Even if the United States Border Patrol's pursuit policy did not comply with California law, the defendant would still not be liable to plaintiff if the actions of Border Patrol agents Ramos and King were not negligent. Under the laws of California, actionable negligence requires: (a) a legal duty to use due care, (b) a breach of such legal duty and (c) such breach as the proximate or legal cause of the resulting injury. United States Liability Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 594, 83 Cal.Rptr. 418, 422 (1970). Plaintiff has the burden of proving by a preponderance of the evidence that defendant was negligent and that such negligence was the proximate cause of plaintiff's injuries. Elder v. Pacific Telephone and Telegraph Co., 66 Cal.App.3d 650, 657, 136 Cal.Rptr. 203, 206 (1977).

Negligence is a mixed question of law and fact and the determination of negligence requires the testing of

particular facts against a predetermined standard of conduct. Miller v. United States, 587 F.2d 991, 994 (9th Cir. 1978). The existence and extent of a legal duty of care are questions of law, but whether such a duty has been breached and whether proximate cause exists are questions for the finder of fact. Doggett v. U.S., 875 F.2d 684, 692-93 (9th Cir. 1989).

California law provides that the driver of an emergency vehicle, including a law enforcement officer in pursuit of a suspect, has a "duty to drive with due regard for the safety of all persons using the highway." Cal. Veh. Code §§ 21055 and 21056 (West 1971 and West Supp. 1992). The conclusion that agents Ramos and King drove with due regard for the safety of others is supported by evidence indicating that the pursuit route was virtually devoid of other traffic, that reasonable speeds and distances between the vehicles were maintained and that the pursuit was brief and took place over a short distance.

Plaintiff has failed to show by a preponderance of evidence that any act or omission by defendant's employees or any of them breached their legal duty of care to plaintiff or that any such breach was the proximate or legal cause of any injury suffered by plaintiff. This tragic accident was not the result of any negligence on the part of agents Ramos and King, who were properly performing their duties as United States Border Patrol agents.

Accordingly, judgment will be entered that plaintiff take nothing by reasons of his complaint herein, that the action be dismissed on the merits and that defendant recover from plaintiff its costs of suit incurred.

DATED: This 20th day of August, 1992.

/s/
Lawrence T. Lydick
United States District Judge

Raymond P. Johnson
LAW OFFICES OF RAYMOND P. JOHNSON
10990 Wilshire Blvd.
Suite 1150
Los Angeles, CA 90024

Scott H. Park, AUSA
Jim Sullivan, AUSA
Office of the US Attorney, Civil Division
Room 7516 Federal Building
300 North Los Angeles Street
Los Angeles, CA 90012

APPENDIX F

ORIGINAL
FILED
DEC 1 1992
Clerk, U.S. District Court
Central District of California
Santa Ana Office

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL STUART, an individual, Guardian Ad Litem for Nicholas Stuart in his individual capacity and as Administrator of the estate of Babette Stuart, deceased,	NO. SA CV 91-42-LTL(RWRx)
Plaintiff,	DECISION ON MOTION FOR NEW TRIAL
vs.	
THE UNITED STATES GOVERNMENT,	
Defendant.	

This matter is before the Court on plaintiff's Motion for New Trial.

Plaintiff argues he was denied a fair trial before an impartial judge; that his case was prejudiced by judicial misconduct; that the Court assumed the role of advocate;

and that prejudicial errors of law occurred because the Court improperly excluded testimony by plaintiff's impeachment and expert witnesses.

Most of plaintiff's argument consists of an attack on the trial Court based on various statements and actions perceived by plaintiff's counsel as evidence of an underlying bias and prejudice against his client. In our view the only appropriate response to such an attack that a trial Court may make is to rely on the official record of the proceedings and upon opposing counsel to point out the misstatements of the record and exaggeration upon which plaintiff relies.

Some perspective we think is appropriate, however. It appears from the record that plaintiff was unable to locate and persuade a single percipient witness to the Immigration and Naturalization Service pursuit to testify on his behalf. This apparently left no alternative but to construct a case through the use of purported experts: an "accident reconstruction" expert from Tempe, Arizona (Arndt); a "deadly force expert" from South Carolina (Alpert) and a highway and traffic safety engineer from San Bernardino (Krueper). The defendant also had its experts (Smith and Thompson). This numerosity of experts being called to testify with respect to what appeared to be a relatively routine pursuit, at least until the time of the crash itself, led the Court at the outset of trial to comment in a jocular fashion to both sides regarding a recent publication with respect to problems that some have noted concerning such testimony. That same numerosity leads us to comment also on other factors that more directly go to plaintiff's instant motion:

1) This was a Court trial. Any statements or actions of the Court, whether it be by questioning of witnesses by the Court, comments by the Court or "body language," tone of voice, facial expression and the like, did not tend to influence any juror as a trier of fact; there was no jury.

2) No objection of any kind ever was made by any counsel or any witness to any question, statement or action by the Court until after conclusion of the trial and the Decision therein.

3) The witnesses whom plaintiff claims were discombobulated and otherwise distressed were not lay witnesses but were paid professional witnesses who make their living creating scenarios and testifying in Court for litigants with respect thereto. We observed no occasion on which any such witness appeared upset, confused or disconcerted by any question or action of the Court and the record does not reflect any such occasion. Here each such witness claimed extensive courtroom experience and the likelihood of their becoming discombobulated by any attitude or question of the Court in a Court trial seems highly unlikely, despite post verdict claims to that effect by two of them untimely made in connection with this motion.[1]

It is our view that plaintiff has failed to meet its burden of showing that this Court had or evinced any actual

---

[1] Defendant has objected to certain declarations filed by plaintiff as untimely under Fed. R. Civ. P. 59(c) and Central District Local Rule 15.4. The objection is well taken and the offending declarations are ordered stricken from the records of this action.

bias or prejudice, unfairly or illegally prevented plaintiff from calling any impeachment witness, precluded plaintiff's experts from presenting any opinion of significance or otherwise denied plaintiff a fair trial by an impartial judge. The overwhelming weight of the evidence taken in its entirety demonstrated that under applicable factual and legal standards defendant's employees had not been negligent. In addition it appeared as well that under applicable law defendant was immunized from this particular action.

The Motion For New Trial accordingly is denied.

The Clerk of the Court will serve copies of this Decision on Motion For New Trial by United States mail upon counsel of record.

DATED: This 1st day of December, 1992.

/s/
Lawrence T. Lydick
United States District Judge

Raymond P. Johnson
LAW OFFICES OF RAYMOND P. JOHNSON
10990 Wilshire Blvd.
Suite 1150
Los Angeles, CA 90024

Jim Sullivan, AUSA
Office of the US Attorney, Civil Division
Room 7516 Federal Building
300 North Los Angeles Street
Los Angeles, CA 90012

APPENDIX G

28 U.S.C. § 1346(b)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

APPENDIX H

CALIFORNIA GOVERNMENT CODE § 820.2

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

APPENDIX I

28 U.S.C. § 2680(a)

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

APPENDIX J

RULE 702, FEDERAL RULES OF EVIDENCE

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, e. .ience, training, or education, may testify thereto in the form of an opinion or otherwise.

Supreme Court, U.S.
FILED
SEP 21 1994
OFFICE OF THE CLERK

No. 94-322

In the Supreme Court of the United States

OCTOBER TERM, 1994

PAUL STUART, GUARDIAN AD LITEM FOR NICHOLAS STUART AND ADMINISTRATOR OF THE ESTATE OF BABETTE STUART, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK B. STERN
JONATHAN R. SIEGEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court acted within its discretion in barring the admission of certain expert evidence relating to standards of conduct for high-speed police chases.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Forest Conservation Council v. *Devlin*, 994 F.2d 709 (9th Cir. 1993) 4

Tomcsik v. *United States*, 720 F. Supp. 588 (E.D. Mich. 1989), aff'd, 917 F.2d 564 (6th Cir. 1990), cert. denied, 499 U.S. 948 (1991) 4

Statutes:

Federal Tort Claims Act:

28 U.S.C. 1346(b) 2

28 U.S.C. 2680(a) 5

Cal. Veh. Code § 17004.7(b) (West Supp. 1994) 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-322

PAUL STUART, GUARDIAN AD LITEM FOR NICHOLAS STUART AND ADMINISTRATOR OF THE ESTATE OF BABETTE STUART, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 23 F.3d 1483. The opinion of the district court (Pet. App. E1-E12) is reported at 797 F. Supp. 800.

JURISDICTION

The judgment of the court of appeals was rendered on March 1, 1994. The court amended its decision slightly and otherwise denied a petition for rehearing on May 24, 1994. Pet. App. B1-B3. The petition for a writ of certiorari was filed on August 22, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 6, 1990, agents of the United States Border Patrol were following a car they believed to be carrying illegal aliens. When the agents switched on the siren of their car, the suspect car sped away, resulting in a chase. During the chase, the suspect car crashed into a car driven by petitioner Paul Stuart, in which members of Stuart's family were passengers. Stuart and his minor son were injured and his wife was killed. Pet. App. A2, A3, E2-E3.

Petitioner brought suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), in the United States District Court for the Central District of California. Following a bench trial, the district court held that the government agents had not been negligent in their pursuit of the suspect car. Pet. App. E10-E11. To the contrary, the court concluded that the agents had complied with the Border Patrol's written policy governing the operation of Border Patrol vehicles during pursuits and emergency situations, and that the agents had acted reasonably and exercised due care in their actions involving the pursuit. *Id.* at E6. The court found that the Border Patrol agents had acted with "due regard for the safety of others," noting particularly that "the pursuit route was virtually devoid of other traffic, that reasonable speeds and distances between the vehicles were maintained and that the pursuit was brief and took place over a short distance." *Id.* at E11.

The district court also held, in the alternative, that the government was entitled to immunity under Sec-

tion 17004.7(b) of the California Vehicle Code, which provides:

> A public agency employing peace officers which adopts a written policy on vehicular pursuits complying with subdivision (c) is immune from liability for civil damages for personal injury to or death of any person or damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued by a peace officer employed by the public entity in a motor vehicle.

Cal. Veh. Code § 17004.7(b) (West Supp. 1994). See Pet. App. E7-E10. Accordingly, the district court entered judgment for the government.

The court of appeals affirmed. On the issue of immunity, the court held that Section 17004.7(b) of the California Vehicle Code does not apply to officers of the United States in an action under the FTCA, because the federal government's liability under the FTCA is determined with reference to the liability of a private party under like circumstances, not to that of a state governmental entity. Pet. App. A8-A10. The court nonetheless upheld the judgment of the district court, because the district court's finding that the government agents had not been negligent was not clearly erroneous. *Id.* at A10. The court of appeals also rejected petitioner's contention that the district court had erred in excluding certain expert testimony regarding high-speed police chases. *Id.* at A7-A8.

ARGUMENT

1. Petitioner claims (Pet. 11-13) that the district court improperly excluded proffered expert testimony regarding high-speed police chases. The admissibility of expert testimony turns on whether it will assist the trier of fact, *Forest Conservation Council* v. *Devlin*, 994 F.2d 709, 713 (9th Cir. 1993), and its admission or rejection in a particular case is a matter entrusted to the sound discretion of the district court, *id.* at 714. As the court of appeals observed, the questions that elicited the objections in this case "appeared to seek an opinion on whether probable cause existed to stop the [suspect vehicle]," Pet. App. A8, a point on which the district court required no expert assistance, *ibid.* As the court of appeals also observed, the proffered testimony concerning standard police procedures might not have shed light on what is reasonable conduct for Border Patrol officers. *Ibid.* Accordingly, the court of appeals correctly held that the district court did not abuse its discretion in excluding the evidence.

There is no circuit conflict on this issue. The one case petitioner cites (Pet. 12-13) as conflicting, *Tomcsik* v. *United States*, 720 F. Supp. 588 (E.D. Mich. 1989), aff'd, 917 F.2d 564 (6th Cir. 1990) (Table), cert. denied, 499 U.S. 948 (1991), did not purport to hold that expert testimony on the appropriate standards for high-speed chases must always be admitted. That the court in *Tomcsik* chose to admit such testimony shows, at most, that the district court there made a discretionary decision regarding the admission of evidence different from the decision made by the district court in this case.

2. Petitioner argues (Pet. 18) that, in cases brought under the FTCA, the United States should not enjoy immunities granted by state law to state

governmental entities. That contention cannot be a basis for review, because the court of appeals expressly accepted petitioner's argument that the federal government's liability in an FTCA suit must be governed by that of a private party under like circumstances, not by that of a state governmental entity. Pet. App. A8-A10. The Ninth Circuit did not hold that "Border Patrol agents may not be held liable for initiating vehicular pursuits," Pet. 14; rather, it affirmed the district court's finding that the Border Patrol agents did not act negligently in this case.

3. Petitioner also claims (Pet. 14-18) that this case presents a conflict between the "discretionary function" exception to the FTCA, 28 U.S.C. 2680(a), and a similar discretionary function exception applicable to tort actions against state entities under California law. Petitioner acknowledges that neither the district court nor the court of appeals even discussed the discretionary function exception. Petitioner argues (Pet. 14), however, that the Ninth Circuit's holding that the exclusion of the expert testimony was not an abuse of discretion necessarily implies that the proffered testimony was not relevant to the issue of negligence because the agents were immune from liability. This interpretation of the court's holding is flatly contradicted by the language of the court's opinion, which makes clear that the expert testimony was rejected solely on the ground that the district court found the proffered testimony unhelpful to its determination of negligence. Pet. App. A7-A8. Neither the district court's rejection of the expert testimony nor the district court's ultimate finding that the agents were not negligent implicated in any way the discretionary function exceptions to liability under state or federal law.

4. Finally, petitioner asks (Pet. 19) this Court to establish that the government may be held liable for its employees' "negligent failure to balance the risk of harm to the public posed by initiation of the pursuit against the need to apprehend the suspects." The appropriate standard for negligence in high-speed police chases is not properly before this Court. That standard is a matter of state, not federal, law. Moreover, on the merits, neither the district court nor the court of appeals implied that officers should not balance the risk of harm to the public against the need to apprehend the suspects. To the contrary, the district court found, under the facts of this case, that the Border Patrol agents acted "with due regard for the safety of others," Pet. App. E11, and concluded that the agents were not negligent. The court of appeals affirmed that finding as not clearly erroneous. *Id.* at A10. Petitioner's disagreement with the district court's conclusions is fact-specific and raises no question of general importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK B. STERN
JONATHAN R. SIEGEL
Attorneys

SEPTEMBER 1994

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 301157 86208